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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: TRS Research--Costs

File: B-290644.2

Date: June 10, 2003

Robert G. Fryling, Esq., Blank Rome Comisky & McCauley, for the protester.
Capt. Gregory A. Moritz, Department of the Army, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request for recommendation that it be reimbursed costs of pursuing protest is denied where protester fails to document the reasonableness of hourly rate claimed for attorney's services and fails to provide any evidence that it is obligated to pay the legal fees claimed regardless of whether they are recovered from the government.

DECISION

TRS Research requests that we recommend that the Department of the Army, Military Traffic Management Command (MTMC), reimburse the firm \$17,425 for its costs of filing and pursuing its protest under request for proposals (RFP) No. DAMT01-02-R-0028, for the lease of intermodal container equipment and provision of related program management services.

We deny the request.

This claim arises from a protest filed by TRS Research alleging that the agency had improperly bundled its requirements. By decision of September 13, 2002, we sustained the protest, finding that the agency had bundled the procurement without complying with the requirements of the Small Business Act, at 15 U.S.C. § 632(o)(2) (2000), and its implementing regulations, at 13 C.F.R. § 125.2(d) (2002).

We recommended that the agency conduct the required statutory and regulatory reviews to determine whether the bundling of requirements was justified, revise the RFP, if appropriate, and request new proposals. We also recommended that the protester be reimbursed the costs of filing and pursuing the protest, including

attorneys' fees. The protester was advised to submit to the contracting agency, within 60 days of receiving our decision, its detailed claim of the time expended and costs incurred in pursuing its protests. See Bid Protest Regulations, 4 C.F.R. § 21.8(f) (2003).

TRS submitted its claim to the agency on October 2, seeking reimbursement of legal expenses associated with pursuit of the protest. The claim briefly set out information regarding the time expended by the attorney, the type of work performed, and the dollar amount claimed for the work. The legal fees were calculated by multiplying the identified time by a claimed hourly rate of \$425. The claim sought a total of \$17,722.50 in protest costs.

By letter of November 12, the contracting officer notified protester's counsel that the agency believed that the claim contained charges for work unrelated to the protest or otherwise unallowable, and was based on what appeared to be an unreasonably high hourly rate. Although she did not question the overall amount, the contracting officer expressed concern that all of the legal work performed was charged at a rate of \$425 for a senior attorney. In her opinion, it would have been more reasonable to charge the work at a lower associate attorney rate, with a limited amount of work charged at the higher supervisory attorney rate. Based upon her research of claims decisions issued by our Office, the contracting officer concluded that a rate of \$425 seemed excessive. For purposes of settling the matter, MTMC offered payment of TRS's protest costs at an hourly rate of \$350, for a total payment of \$13,125.

On November 15, TRS refused the agency's offered payment amount and rejected the suggested hourly rate of \$350. Counsel for TRS explained that he was the sole attorney on the protest, so all of the legal services performed are charged at his senior attorney hourly rate of \$425. After deleting some charges that TRS counsel acknowledged were erroneously included in the initial claim, TRS submitted a revised claim for \$17,425 in protest costs.

In her response of November 21, the contracting officer explained that, in order for her to assess the reasonableness of the claimed hourly rate of \$425, the protester needed to provide proof that the claimed rate is the one customarily charged for his services and that it is within the bounds of rates charged by senior attorneys for similar work in the Philadelphia area, where counsel for TRS works. She also requested proof that TRS had a firm obligation to pay for the claimed legal services at the claimed hourly rate, regardless of whether payment was recovered from the agency; in this regard, the contracting officer suggested that the firm submit a copy of paid invoices for the claimed services.

By letter of November 26, TRS counsel certified that the amount claimed had been billed to his client, but stated that the invoice had not yet been paid. No copy of an actual invoice sent to TRS, or any information as to its delivery to or receipt by TRS, or any evidence of an agreement with TRS to pay for legal services at the claimed \$425 hourly rate, was provided by the firm. Despite MTMC's request for that

information, TRS counsel failed to definitively state whether the legal fees remained due from TRS even if they were not recovered from MTMC.

As to his claimed hourly rate of \$425, counsel explained that his law firm set the rate to reflect his 30 years of experience, and that it resulted from a market analysis by the firm of law firm fees. No supporting documentation was provided, however, to substantiate the claim, to show the hourly rate was the one customarily charged by TRS counsel, or to prove that similar rates are charged by attorneys for similar work in the Philadelphia area. As to the referenced market analysis purportedly conducted by his firm, TRS counsel failed to provide the analysis, stating only that he does not have access to it. TRS counsel then urged the contracting officer not to limit her review of the reasonableness of his rate to a comparison of rates charged by attorneys in the Philadelphia area; rather, he suggested that she consider the rates of government contracts attorneys nationwide. TRS counsel concluded his November 26 correspondence with an offer to resolve the matter by payment of a reduced amount of \$16,000.

TRS attempted to contact the contracting officer in late December to inquire about payment of the firm's claim. On January 2, 2003, the contracting officer denied the protester's claim for costs as inadequately supported, based on the firm's failure to demonstrate both the reasonableness of the claimed hourly rate of \$425 and any obligation to pay the claimed legal fees even if they were not recovered from MTMC. This claim to our Office followed. TRS requests that we resolve the amount of legal fees to be recovered from the agency in pursuit of its protest.¹

Under the Competition in Contracting Act of 1984, as amended, 31 U.S.C. § 3554(c)(1) (2000), our Office may recommend that a protester be reimbursed the costs of filing and pursuing a protest, including reasonable attorneys' fees, where we find that a solicitation or the award of a contract does not comply with statute or regulation. This is to relieve parties with valid claims of the burden of vindicating the public interests that Congress seeks to promote. Hydro Research Science, Inc.--Costs, B-228501.3, June 19, 1989, 89-1 CPD ¶ 572 at 3. A protester seeking to recover the costs of pursuing its protest, however, must submit sufficient evidence to support its monetary claim; the amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable. Berkshire Computer Prods., Inc.--Costs, B-240327.3, Dec. 30, 1994, 95-1 CPD ¶ 6 at 2. Although we recognize that the requirement for documentation may sometimes entail certain practical difficulties, we do not consider it unreasonable to require a protester not only to document in some detail the amount and purpose of activities associated with the claimed effort, but to establish that the claimed hourly rates reflect the customary rates for similar work performed by attorneys in their community.

¹ The agency filed a report with our Office responding to the claim. TRS chose not to respond to that report.

See Galen Med. Assocs., Inc.—Costs, B-288661.6, July 22, 2002, 2002 CPD ¶ 114 at 4; Armour of Am., Inc.—Costs, B-237690.2, Mar. 4, 1992, 92-1 CPD ¶ 257 at 7. Further, in order for a protester to recover costs, there must be evidence to show that it has an obligation to pay the costs regardless of whether they are recovered from the government; an obligation to pay costs that is contingent upon recovery from the government may not properly be reimbursed. See Boines Constr. & Equip. Co., Inc.—Costs, B-279575.4, Apr. 5, 2000, 2000 CPD ¶ 56 at 4-5.

Our review of the record confirms the reasonableness of the agency's conclusion that the protester has not adequately documented its protest costs. Despite the passage of many months and several requests from the agency to do so, the protester has not submitted any documentation to show that the \$425 hourly rate claimed by TRS counsel is representative of that charged for similar services in the Philadelphia area, where he practices law.

We have repeatedly held that, while higher rates may be considered for attorneys with additional experience, the reasonableness of an attorney's hourly rate must be documented as consistent with the customary fee charged for similar work in the community by other attorneys. See Armour of Am., Inc.—Costs, *supra*. Here, while TRS counsel has stated that he has 30 years of experience, he has provided no information as to whether similar attorneys' fees are customarily charged in his locale for similar work.² Clearly, TRS could have demonstrated the reasonableness of the claimed hourly rate by providing, for example, a survey of local law firms' rates. See, e.g., Bay Tankers, Inc.—Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524 at 3 (protester submitted attorneys' fees information published in a local legal periodical as support for the reasonableness of its claimed protest costs). It is also conceivable that the market analysis said to have been performed by TRS counsel's firm could have provided the necessary comparative base for review of the reasonableness of the claimed rate; TRS did not, however, submit to the agency or our Office, either under the protective order issued in the protest or otherwise, a copy of the analysis. In short, the reasonableness of the claimed hourly rate—although repeatedly questioned by the agency, and despite several opportunities for TRS to submit the requested supporting documentation—remains wholly unsubstantiated.

² While TRS counsel suggests that his hourly rate should instead be compared to those of government contracts attorneys nationwide, the reasonableness of an attorney's hourly rate is generally measured by comparison to the rates charged for similar work in the particular community where that attorney practices, not in other communities. See Galen Med. Assocs., Inc.—Costs, *supra*; Armour of Am. Inc.—Costs, *supra*. In any event, our review of the record shows that TRS did not provide any documentation to support the general contention that the claimed hourly rate is representative of that charged by government contract attorneys nationwide.

In addition to questioning the claimed hourly rate, the contracting officer also asked TRS to provide evidence establishing that it was obligated to pay the legal fees regardless of whether they were recovered from the government. In his response to the contracting officer's request, TRS counsel "certified" that his firm "billed TRS" and that TRS "owes the legal fees for pursuit of the protest" Letter from TRS Counsel, Nov. 26, 2002, at 2. The sole documentary support for the claim is a two-page document prepared by TRS counsel's law firm, whose name and address appear at the top. The document, dated September 30, 2002, contains a list of dates, hours worked, and dollar amounts, along with a brief description of the work performed. At the bottom of the second page, the words "Invoice Total" appear, followed by a dollar amount representing the total of the individual charges listed. There is nothing in this document to show that it has ever been submitted to TRS for payment, much less paid.³ There is no other evidence, such as a retainer agreement, to establish TRS's obligation to pay the legal fees claimed. In view of TRS's failure to produce any such evidence, despite specific requests to do so, we cannot conclude that TRS has made the required showing that it is obligated to pay the legal fees regardless of whether they are recovered from the government.

In these circumstances, we deny the request for a recommendation that TRS be reimbursed its claimed protest costs. It is the protester's obligation to demonstrate the reasonableness of the claim and thus that payment of the claim with government funds is justified. TRS simply has not made the requisite showing here. While we recognize that TRS may have incurred costs in pursuing its protest, claimed costs cannot be recovered where they are not adequately documented. Galen Med. Assocs., Inc.—Costs, *supra*.

Anthony H. Gamboa
General Counsel

³ In his November 26 letter, TRS counsel acknowledged that the bill had not yet been paid as of that date, almost 6 months after the protest was filed and more than 3 months after the decision on the protest was issued. There is no evidence in the record that the bill even now has been paid.